

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

76-1435

To be argued by
Andrew J. Maloney

76-1440

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 76-1440

B
JAS

UNITED STATES OF AMERICA,

Appellee,

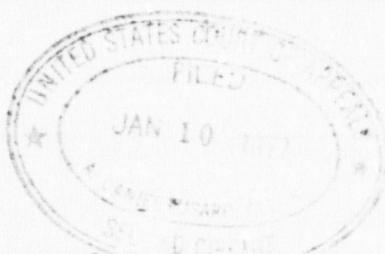
v.

JOHN M. KING and
A. ROWLAND BOUCHER,

Appellants.

On Appeal from the United States District Court
For the Southern District of New York

APPELLANT BOUCHER'S BRIEF



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STATEMENT OF ISSUES

1. Did the Court commit error in refusing to charge or permit a defense of reliance on counsel on the crucial issue of the bona fide nature of the Mecom sale?

2. Did the Government make improper use of Boucher's immunized bankruptcy testimony?

3. Was the Court in error in its rulings permitting the Government to introduce improper and collateral evidence, limiting appellant's response to that evidence, and refusing to properly charge the jury?

4. Did the Court commit error by excluding documents and preventing cross-examination of the prior inconsistent statements of a key Government witness and did the Government's admittedly intentional pre-indictment delay and the ensuing prejudice therefrom violate due process?

RELIMINARY STATEMENT

A. Rowland Boucher appeals from a judgment of conviction entered September 7, 1976 in the United States District Court for the Southern District of New York after a six week trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury.

Indictment 75 Cr. 70, filed January 20, 1975, charged Boucher and his co-defendant, John M. King, in four counts with three substantive violations of securities fraud, mail and wire fraud, and a conspiracy to do so. Specifically, count one charged both defendants with conspiracy to commit a mail and wire fraud and a fraud relating to the purchase and sale of securities in violation of Title 18, United States Code, Section 371; count two charged a mail fraud in violation of Title 18, United States Code, Section 1341; count three charged a wire fraud in violation of Title 18, United States Code, Section 1343; and count four charged a fraud in connection with the purchase and sale of securities in violation of Title 15, United States Code, Section 78 j (B).

Trial of Boucher and King began on May 24, 1976, and concluded on July 1, 1976 when the jury found each defendant guilty as charged. On September 7, 1976, Judge Frankel sentenced Boucher to concurrent terms of imprisonment of 7 months on each of counts one, three and four, and to a three-year period of unsupervised probation on count two.

Boucher is presently released on his own recognizance pending appeal.

STATEMENT OF FACTS

I. Introduction

King and Boucher were respectively Chairman of the Board and President of King Resources Company ("KRC") which was controlled by the King family and was formed in 1961 for the purposes of the worldwide exploration, development and sale of natural resource properties.

In 1968 and 1969, Fund of Funds ("FOF"), a two billion dollar offshore open-ended investment company purchased from KRC a fifty percent (50%) undivided interest in approximately 22.3 million acres of Canadian arctic oil and gas permits (leases) for approximately \$11 million.

FOF was obligated to periodically value its investments for two reasons. First, FOF had to determine its "net asset value" in order that its shares could be properly sold and redeemed. Second, FOF was obligated to pay IOS Ltd. ("IOS"), its investment advisor, a ten percent (10%) commission on any appreciation of its assets.

To properly value their position in the Canadian Arctic, FOF had to establish value by either an independent appraisal or a sale of a portion of the total position; or utilize a combination of both methods.

For the 1969 fiscal year, IOS agreed to sell approximately nine percent (9%) of FOF's 50% interest in 22 million net acres in order to value their residual position. As a result of potential tax liabilities ensuing from the application of Canadian tax laws to FOF from the partial sales contemplated, FOF requested KRC to

effect the partial sales as an accommodation. On December 24, 1969, KRC sold nine percent (9%) of its holdings to two independent oil and gas entrepreneurs. On January 15, 1970, on the basis of these sales FOF's Board voted to reevaluate the Funds' Canadian Arctic holdings to \$100 million, or approximately \$79 million over the prior valuation on June 30, 1969.* As a result, on January 19, 1970, FOF transferred a \$10 million or ten percent (10%) management fee to IOS on FOF's gain.**

According to the Government's proof, the two sales, which were the basis of the valuation, were not bona fide - arms length transactions, in that King gave "buy back" guarantees to the purchasers. The gravamen of the fraud charges against appellants was that they misrepresented to Arthur Andersen & Co., FOF's auditors, in January and May 1970 confirmation letters that the sales were bona fide - arms length transactions.

II. The Government's Case Against Boucher

The trial lasted almost six (6) weeks with forty-eight (48) witnesses and three hundred sixty-seven (367) exhibits. The Government's case depended entirely on the facts of two Arctic

* By July 1969, an independent geologist and consultant, J. C. Sproble, prepared a report for KRC appraising the Canadian Arctic interest at an average value of approximately \$1.88 per acre. In consequence, the value of Fund of Funds' interest at that time was at least \$20,962,000 (see ¶15 of Indictment), i.e., a net increase of almost \$10 million on its initial investment.

** The two sales which were the basis of the valuation, and the payment of the ten percent (10%) fee to IOS all occurred on or before January 19, 1970. The Indictment was filed five years and one (1) day later on January 20, 1975.

sales, to wit: sales to John Mecom and Consolidated Oil and Gas Inc. ("COG").

COG was a publicly-owned independent oil and gas company which then and now expressed an interest in participating in the natural resource exploration of the Arctic (Tr. 1759). Mecom, a multi-millionaire oil and gas operator, whose fame was legendary in the industry, expressed a similar interest.

(Tr. 921-22, 943-45) [App.].*

A. The Mecom Transaction.

The only direct evidence of Boucher's knowledge introduced by the Government on the central issue of the Indictment, to wit: the secret guarantees, was the testimony of Robert Hulsey. Hulsey testified that, because he had previously worked for Mecom, King asked him to be the intermediary between KRC and Mecom in connection with the Arctic sale. Although Hulsey had several conversations with King and Boucher prior to going to Houston on December 23, 1969, his only recollection of discussing the Mecom guarantee with Boucher was on the day prior to leaving** and again upon his return, when he advised Boucher that the contract would not become operative until a side agreement required by Mecom's lawyer, Neil

* App. is a reference to the appendix.

** Hulsey's prior testimony - before the SEC, the Grand Jury, and in civil depositions - never mentioned a December 22 or 23 conversation with Boucher about a repurchase agreement with Mecom before Hulsey delivered the contract to Texas. Hulsey's seven-year old recollection was devoid of any degree of precision and, in fact, he confessed that he could not separate conversations with King and Boucher. (Tr. 892-93, 896-903, Stip. 3336-37) [App.].

Marriot, was prepared. Hulsey did not have any subsequent conversations with Boucher concerning consummation of the side agreement. No other witness was able to impute knowledge to Boucher of any "buy-back" guarantees in either the Mecom or COG transaction up to and including May 27, 1970, the date of the signing of the re-confirmation letter.

B. Consolidated Oil and Gas Inc. ("COG") Transaction.

The only proof supporting the Government's charge on the COG transaction was the interview given by Harry Trueblood, COG Board Chairman, in May 1970 to James Tanner of The Wall Street Journal that he had a right to "put" the Arctic properties back. Trueblood testified that he did not recall ever giving a statement to that effect and denied the existence of any buy-back.* No proof whatsoever was introduced showing that Boucher had any knowledge of any buy-back guarantee on the COG sale, even if one existed.** (Tr. 2571, 1730-1731, 1739-1740) [App.].

C. Reliance on Counsel.

At trial, there was extended colloquy on the issue of Boucher's reliance on advice of counsel before executing the crucial representation letters concerning the bona fide nature of the Mecom-COG sales on January 23 and May 27, 1970. In rejecting the appellant's request to charge or to permit his counsel to argue

* Boucher never contested that he introduced COG to a bank in order to facilitate COG's downpayment financing. See ¶23 of the indictment.

** Booth, COG President at the time, also denied any knowledge of any buy-back guarantee (Tr. 1958, 1961) [App.].

such a defense to the jury, the Court held (a) Boucher would have to remember relying on counsel and (b) that counsel, in rendering his opinion, would have had to have had all the facts. (Tr. 3122-25, 3211-12) [App.].

Obviously, Lowry knew all the facts. He was the key Government witness as to the drafting, timing, and execution (?) of GX 1, the Mecom buy-back guarantee. It was the Government's theory this was all accomplished in or about January 2, 1970. (Tr. 1399-1408, 1419-21, 1427-28, 1431-32, 1437-39, Wing Summation 4298-99) [App.].

The in-charge Arthur Andersen audit partner, Hubbard, testified that on January 20, 1970, three (3) days before execution of one of the key rep letters, Timothy G. Lowry ("TGL"), KRC's general counsel, confirmed in Boucher's presence and with Boucher's concurrence the binding nature of the Arctic purchasers' legal obligations and the fact there was no unilateral way that the purchasers could be relieved of their financial obligations. (Tr. 2266-70; Deft. Ex. AB [memo 1/20/70]) [App.].

Exhibit AB, prepared by Hubbard, in pertinent part states:

"Hub
1-20-70

"Fund of Funds

"Memo Re. Nature of Obligation of Purchasers of Arctic Permit Interests for Exploration Costs

"A 12-31-69

"I discussed the nature of this obligation today w/ Boucher and Lowry. Both parties confirm their understanding of the negotiations, the intent and legal position of the purchasers, namely

there is no unilateral way for them to reduce or avoid their . . . [obligations]
(Emphasis added).

Again, in May 1970, Arthur Andersen, because of The Wall Street Journal article about COG, asked Boucher to reaffirm the validity of the Arctic sales. Before executing the May 27, 1970 representation letter (Ex. 20-II), however, Boucher received from another KRC counsel, William R. Fishman ("WRF"), a draft, Exhibit BK*, which was similar in content to the earlier representation letter submitted on January 23, 1970 to Arthur Andersen. (Ex. 20-U) [App.].

In pertinent part, Exhibit BK, the draft of the May 27, 1970 representation letter that Boucher executed, provided as follows on the Mecom-COG sales:

[Handwritten notation]
"OK
WRF
See prior rep letters
attached is similar
representations
TGL has seen it."

"Draft

"May 25, 1970

"Arthur Andersen & Co.
* * *

* * *

"We give you our assurance that, to the best of our knowledge and belief, there are no such arrangements, verbal or written, whereby the purchasers of such

* This document, Ex. BK, was retrieved from the Government files by Boucher's counsel during the course of an inspection of "Boucher files" in the custody of the U. S. Attorney the Saturday before his trial testimony. (Tr. 2963-65) [App.].

interests could turn them back to the Company, any of its subsidiaries, or any Company officers or companies controlled by them under the respective contracts of sale. It is our opinion that the purchasers of such interests are legally obligated to pay King Resources Company the full amounts specified in the contracts as purchase price of the permits and work obligation commitments (\$10,436,484 for Consolidated Oil and Gas, Inc., \$5,218,241 for John W. Mecom," (Emphasis added).

III. Boucher's Defense

Boucher took the stand in his own defense. His principal testimony was that he did not have any knowledge of any illegal side agreements on the Mecom-COG transactions.

Boucher further testified that KRC, after extensive review, made the determination to acquire substantial holdings in the Arctic to jointly promote with other companies oil and gas exploration in that area. As a result, Boucher and his staff were convinced of the intrinsic value of these properties.* Boucher testified that on the Mecom and COG transactions there was no need to have any guarantees or secret inducements.

In support of his denial of guilty knowledge (which knowledge can only be supported by the testimony of Hulsey), appellant Boucher offered and developed the following proof. If Mecom had informed Boucher of his desire for a "drill to earn"

* Trueblood of COG and Mecom (experienced oil men) were also convinced of the present and future value of the Arctic properties. An offer of proof was made and rejected that the present, 1976, residual joint holdings of the original KRC-FOF acreage was valued at \$400 million. (Tr. 1796-1800)[App.]. This was an approximate profit ratio of twenty (20) times FOF's initial investment of \$11 million for its 50% undivided interest.

contract, this could have been accomplished by a provision in the contract, which provision was standard to the industry. Indeed, Robert Dippo, a KRC house counsel called by the Government on rebuttal and the person who prepared the Arctic contracts, also testified that a "drill to earn" provision could have been inserted in Mecom's contract and was common to the industry. According to Boucher, there would have been no need for a buyer's downpayment advance as a result of this provision.* (Tr. 4165, 2949-52) [App.].

In direct conflict with the Government's theory that defendant Boucher was a "con-man" who falsely puffed the Arctic properties' worth, proof was adduced showing that in June 1970, at a time when the Arctic transactions were suspect, Boucher instructed Arthur Andersen in a memorandum (Ex. BG) that the sale to British Petroleum ("BP") at Sixty-three (\$63) Dollars per acre should not be disclosed to FOF so as not to upset the ongoing negotiations.**

* Mecom testified that his primary interest was earning his interest by putting his "rigs" to work, a method he used frequently. If the "drill to earn" provision had been included in the contract, he would have been permitted to furnish valuable services in return for acquiring his Arctic interest as well as eliminating the necessity of putting out his own funds for a downpayment. (Tr. 936-37, 941-42, 950) [App.]. Under a "drill to earn" contract, the operator receives payments to cover his cost and the profit takes the form of his earned interest.

** The prosecutor, in summation, argued without foundation that the nondisclosure of the BP sale was due to the fact that FOF would not be a participant. The Government, after the verdict, conceded its factual error on the point and entered into a stipulation that the sale was for the benefit of both. The transcript on this point is confused and thus the point is not now raised on appeal. (Tr. 4432-34, 4455, 4493-95; Ex.-BG.) [App.].

Also in direct conflict with the Government's theory of Boucher's participation in the scheme to secretly guarantee Mecom, is Boucher's refusal in the spring of 1971 to consent to the reassignment of Mecom's liability from KRC to Colorado Corporation (a wholly owned King family Corporation) (Tr. 2080-81). Appellant Boucher's position is and was that if he had been party to a side deal at inception, he could have facilitated reassignment, certainly at a time when Mecom, who was in bankruptcy, required the reassignment.*

Although the valuation and the key representations constituting the gravamen of the charges occurred no later than May 27, 1970, the Government sought to prove Boucher's guilty knowledge by claiming a 1971 cover-up.

Armond Frederickson, a KRC director, had testified he advised Boucher in March 1971 of claims made by Marriott, Mecom's attorney, that the Mecom transaction was not an arms-length bona fide one. This information was not disclosed in a June 1971 representation letter to Arthur Andersen (G. Ex. 20-KK) [App.].

Boucher's testimony on this issue was that after receiving the Marriott letter, Fishman, a KRC attorney, advised him to speak to Lowry, KRC general counsel. (Tr. 2765-66) [App.]. Boucher testified further that Lowry advised him there was nothing to be concerned about and that Marriott did

* King testified, as a matter of business judgment and as a result of his belief in the future worth of the Arctic, that he agreed to the re-assignment. (Tr. 3549-50) [App.].

not understand the transaction.* (Tr. 2978-2980) [App.]. Boucher relayed this information to Fishman. The Court excluded Fishman's corroborating testimony on this point on the grounds of hearsay and order of proof despite counsel's representation that it could not afford Fishman's return from Colorado, even though the Government initially withdrew its objection (Tr. 2766-70) [App.]. The Court did later permit a hypothetical question of Fishman relating to Boucher's signing the June 1971 representation letter (Tr. 2801-2802) [App.].

IV. Facts Surrounding the Government's Use of Boucher's Immunized Bankruptcy Testimony

Defendant Boucher moved prior to trial to dismiss the Indictment on the ground that he had been previously immunized in connection with the Bankruptcy proceedings of KRC and that the Government did not meet its burden in establishing that it did not use the testimony or derive benefits from it in connection with the investigation and/or trial of the case. The trial court denied defendants' pre-trial motion with leave to renew after the trial, and then denied the same motion after a post-trial evidentiary hearing as to use of "leads" therefrom.

On August 14, 1971, creditors of KRC filed an involuntary petition in bankruptcy against KRC in Dallas, Texas. Thereafter, the Bankruptcy Court appointed a trustee and Boucher

* Lowry could not recall such an inquiry in March 1971 from Boucher; however, his 1976 trial testimony on the arms-length nature of the Mecom transaction continued to be consistent with Boucher's testimony on this point. (Tr. 1399-1402, 1425, 1453-54, 1463-66) [App.].

as an additional trustee. Both trustees were to perform statutory duties imposed upon the bankrupt under the Bankruptcy Act. At the commencement of these proceedings, Boucher was advised of his rights by an SEC staff attorney who conducted some of the examination; Company counsel reserved all of appellant's rights as to the benefits of any statutory immunity; and Boucher then testified for approximately six hours. (Malone, letter, 5/21/73 enclosing 4 pages Tr. of KRC-Texas Bankruptcy hearing) [App.].

On October 20, 1971, the bankruptcy proceeding in Dallas was transferred to a more appropriate venue, in Denver, Colorado. A new trustee was appointed and defendant Boucher resigned as trustee, although he remained as KRC's Chairman of the Board and Chief Executive Officer. On August 6 and 7, 1973, the trustee's counsel examined Appellant Boucher on various subjects directly relating to the indictment. (Post-Trial Hearing (Post Tr.) 8/20/76; Post Tr. Exs. A, B, Tr. 39-50, 56-61, 64-66, 67-68, 74-81, 144-46.) [App.].

During the period of the bankruptcy proceedings, it was undisputed that Appellant Boucher, in close cooperation with the trustee performing the "statutory duties of the bankrupt", conducted the business affairs of the company. As such, Boucher was paid a salary, performed various administrative duties such as hiring or firing personnel, conducted various drilling programs of KRC, and performed functions with respect to KRC's satisfying its obligations to its creditors. Boucher negotiated, prepared, reviewed and implemented various natural resource contracts entered

into during the course of the bankruptcy proceedings, and submitted affidavits to the Court in connection with the purchase and/or KRC properties. (Maloney Affid. 5/12/76, p.7) [App.].

On the eve of trial, upon substitution of counsel* and a subsequent motion concerning his immunization under the Bankruptcy Act, the Government discovered the following facts. The Government, in reviewing its files, discovered copies of: (a) Boucher's August 6 and 7, 1973 depositions in the KRC bankruptcy proceedings in their "Irrelevant" file (Wing Affid. May 1976 ¶7); (b) excerpted portions of Boucher's deposition of September 13, 1971 in connection with the KRC bankruptcy proceedings in Dallas, Texas (PostTr., 8/20/76, Tr. 18-21; 88-90); [App.] and (c) a copy of the October 10, 1973 trustee's report submitted by John Pfeiffer, the trustee's counsel, which in part took Boucher's testimony into consideration. (Tr. 4; Post Tr. 8/20/76, 14-15.) [App.].

Thomson von Stein ("Von Stein"), SEC staff attorney assigned to conduct the investigation of King and Boucher and assist the U.S. Attorney in the prosecution of the case, conceded he had read the August 6 and 7, 1973 (Denver) transcripts in the summer of 1975, although he did not recall any of that testimony and believed it to be irrelevant. However, the federal prosecutors affirmed that they were concerned and constantly discussed among

* The Court acknowledged that for all intents and purposes Boucher had been for many months pro se. (J. Frankel Memorandum decision 5/14/76 [App.].

themselves and Von Stein the position the defendants would take at the time of trial. (Wing Affid. May 1976, ¶¶ 5, 7 and Vizcarrondo Affid. May 1976, ¶ 12) [App.].

At the Post-Trial hearing, Von Stein acknowledged that he contacted Pfeiffer shortly after being assigned to the case in September 1973. Von Stein also acknowledged that he did not focus on the Mecom - COG transaction until after his contact with Pfeiffer. (Post Tr. 8/20/76, Tr. 9-12) [App.]. Von Stein also conceded that neither he nor anyone else in the Government made any efforts to stay Pfeiffer's bankruptcy investigation. (Post Tr. 8/20/76, Tr. 35-36) [App.],

Von Stein also testified he had a number of conversations in the fall of 1973 with Pfeiffer, after the investigation had focused on the Arctic transactions, including the Mecom- COG transaction. Von Stein did not recall discussing Boucher's testimony with Pfeiffer, but he did recall requesting and obtaining in the fall of 1973 the Trustee's Report, which questions the bona fides of the Mecom transaction. (Post Tr. 8/20/76, Tr. 9-12, 14, 15, 32-33) [App.].

The Government does not now dispute that Pfeiffer had to take into consideration Boucher's testimony in the preparation of his report. The Government also does not now dispute, contrary to earlier affidavits, that the August 6 and 7, 1973 transcripts contained relevant matters pertaining to the indictment. (Post Tr. 8/20/76, Tr. 13-14, Post Tr. Ex. A, Ex. B; Trial Tr. 4; Von Stein Affid. May 1976, ¶ 9) [App.].

The examination of defendant Boucher by Pfeiffer

paralleled the indictment on at least twelve (12) separate subject matters in his August 1973 examinations of Boucher.

I. The origins of the IOS, FOF, KRC relationship including the Acapulco meeting, contacts with Cowett and Scott, sale and pricing of natural resource properties and the commissions the IOS complex would receive. [Post Tr. Ex. A, 39-50] [App.].

II. The Bahamian-Regency Corporation, the basis upon which properties were vended to FOF, and the periodic valuations of properties. [Ex. Post Tr. Ex. A, 56-60, 64-66] [App.].

III. The alleged sale of dry holes [Post Tr. Ex. A, 60] [App.].

IV. The Arctic Sale and the question [at trial of this case] of the percentage to be sold to value the residual position. [Post Tr. Ex. A, 67-68] [App.].

V. Trueblood [COG] transaction. [Post Tr. Ex. A, 73] [App.].

VI. Bristol Bay (Post Tr. Ex. A, 74] [App.].

VII. Mecom transaction and question of side agreements. [Post Tr. Exs. A and B, 75, 76, 77, 145, 146] [App.].

VIII. Bennett King-John King transactions. [Post Tr. Ex. A, 78, 79, 80, 81] [App.].

IX. The Mecom bidding for Arctic drilling [Post Tr. Ex. A, 76-79] [App.].

X. The vending of properties by the Colorado corporations to Fund of Funds through KRC at a ten percent (10%) profit margin. [Post Tr. Ex. B, 141, 142, 143, 144] [App.].

XI. The attempt to take over IOS and Fund of Funds by KRC.

XII. Mark-ups and costs to KRC [Post Tr. Ex. A, 56-61] [App.].

* * *

Appellant Boucher's bankruptcy testimony also suggested there may have been, in view of subsequent events, some side agreements to the Mecom transaction* (Post Tr. Ex. A [August 6, 1973 Tr.] 75-77; Post Tr. Ex. B [August 7, 1973 Tr.] 145-46) [App.].

During the post-trial hearing, the defense also learned for the first time that Von Stein was directed by the chief federal prosecutor to examine the Dallas, Texas examination to find Boucher's "lie". The Dallas, Texas testimony essentially dealt with Boucher's being asked to opine on the value of the Arctic permit holdings of KRC in 1971 at the first meeting of creditors (Post Tr. 8/20/76, Tr. 18-22). [App.]. At this time, the chief federal prosecutor in addition acknowledged to the Court that his reasoning in asking Von Stein to examine the Dallas transcript was to ascertain what kind of a witness Boucher would make. (Post Tr. 8/20/76, Tr. 88-90; Wing Affid. ¶ 7 id., Vizcarrondo Affid. ¶ 12 id..) [App.].

* This was contrary to Von Stein's post-trial testimony:

"Is there anything in there in Boucher's testimony that questions the bona fidees of those transactions?"

Answer - "No" (Post Tr. 8/20/76 Tr. 79).

ARGUMENT

POINT I

THE COURT ERRED IN REFUSING TO CHARGE
AND PERMITTING A DEFENSE OF RELIANCE ON
COUNSEL ON THE CRUCIAL ISSUE OF THE
BONA FIDE NATURE OF THE MECOM SALE

The Court committed reversible error in refusing a request to charge and a defense by Boucher of reliance on counsel in connection with Boucher's execution of the two key confirmation letters of January and May 1970 which were the sine qua non of the indictment.

The Government's proof was that Timothy G. Lowry ("TGL"), KRC general counsel and King's personal attorney, on instruction from King, drafted the unexecuted side agreement between Mecom and King (Gx 1) on or about January 2, 1970.* About this same time, Lowry communicated by phone and mail with Marriott, Mecom's attorney. Thereafter, on January 20, 1970, Lowry and Boucher met with Hubbard, the Arthur Andersen auditor, concerning the contractual obligations arising out of the Arctic sales (Mecom - COG). (Tr. 2266-70) [App.].

In Hubbard's contemporaneous memorandum (Ex. AB), Hubbard recorded that Lowry affirmed in Boucher's presence the binding legal nature of the Arctic contracts and that the purchasers could not unilaterally avoid their contractual obliga-

* The Government, in its Bill of Particulars, declined to name any other co-conspirators other than King and Boucher. At trial for tactical reasons, they attempted to do otherwise, which the Court denied; and the words "other persons unknown to the Grand Jury ..." were struck from the indictment. (Tr. 3139-3140; (Bill of Particulars ¶3(a)) [App.].

tions.* (Tr. 2266-70, 2298-2300) [App.]. Three days later, Boucher executed the January 23, 1970 confirmation letter as to the bona fide arms-length nature of the KRC-Mecom sale.

In May 1970, when Arthur Andersen required a re-confirmation letter as to the bona-fide nature of the transactions, a draft confirmation letter (Ex. BK) was transmitted to Boucher by William R. Fishman (WRF), a KRC counsel, with the following inked notation, "OK. WRF. See prior rep letters. Attached is similar representation. TGL has seen it."

(Tr. 2963-2965) [App.].**

The events concerning Boucher's execution of the Arthur Andersen rep letters occurred six (6) to seven (7) years prior to trial. It is not surprising that when Boucher testified he stated he did not have a present recollection of (a) being present with Lowry on the occasion of the January 20, 1970 interview by Arthur Andersen (Hubbard) and (b) receiving the draft of the May 27, 1970 rep letter with Fishman's notation. (2955-56, 2964) [App.]. On cross-examination, the Government therefore elicited from Boucher that since he did not recall the above-mentioned events he could not say that

* Indeed, Lowry, at the time of trial, maintained that the side letter (GX 1) which reflected the buy-back guarantee to Mecom, did not negate the arms-length nature of the sale. Lowry maintained, albeit mistakenly, that since Mecom had an obligation to KRC, the collateral understanding between King, personally, and Mecom only insured that KRC would be satisfied. (Tr. Lowry 1453-54) [App.].

** EX BK, the draft of the May 27, 1970 rep letter, was found in Boucher's files, which were in the Government's possession for some years. (Tr. 2963) [App.].

he relied on legal advice.* (Tr. 3158) [App.].

As a result, when the defense requested a charge on the reliance on counsel issue, the Court ruled that ". . . there is absolutely no basis for that kind of a charge [reliance on counsel]; when a man under oath says he has no recollection of seeking legal advice and no indication he relies on it and no indication of the side deals" (Tr. 3122-25, 3211-12) [App.]. Furthermore, the Court refused counsel the opportunity to argue this contention to the jury. (Tr. 3213) [App.].

The Court was clearly in error in denying this request to charge and foreclosing Boucher's counsel from arguing this defense to the jury. Although Boucher's recollection was dimmed by the passage of a substantial period of time, the documentary evidence, nonetheless, clearly supports the inference that Boucher, informed of Lowry's position on the Mecom sale, executed the two key rep letters with Lowry's approval.

On the issue of intent to falsely misrepresent the Arctic sale transactions by means of the confirmation letters, Boucher was entitled to a charge on the reliance on counsel issue. While the Court might have told the jury to scrutinize this defense with care or have revised the charge submitted by the defense, ". . . he was not privileged to withdraw the point from consideration." United States v. Platt, 435 F.2d 789, 793 (2d Cir. 1970).

* By and large, none of the Arthur Andersen people could testify of their own recollection of the events of 1970 and had to rely almost exclusively on their workpaper files. Obviously, Boucher's own failure of recollection can be directly attributable to the delay of prosecution.

This Court, in United States v. Platt, ⁴ supra at 792, held:

". . . whether the record contained an evidentiary basis sufficient to entitle the defendant to an instruction on the defense of reliance, the threshold required for this is not very high.

A criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be."

See also, United States v. Alfonso-Perez, 535 F.2d 1362, 1365 (2d Cir. 1976); United States v. Phillips, 217 F.2d 435, 440-42 (7th Cir. 1954); United States v. O'Connor, 237 F.2d 466, 474 n. 8 (2d Cir. 1956).

The Exhibits (AB, BK), standing alone, are substantial proof of Boucher's reliance on Lowry's opinion as corporate counsel as to the validity of the Mecom transaction. In this case, the documents whose "memory" does not fade over time, show that the appellant had relied on a counsel, privy to all key facts, before signing the January-May 1970 representation letters. The Court, however, erroneously added the unwarranted burden of requiring the appellant to recall relying on counsel before permitting the charge or the defense.

POINT II

THE GOVERNMENT MADE IMPROPER USE OF BOUCHER'S IMMUNIZED BANKRUPTCY TESTIMONY

Contrary to the Department of Justice's own guidelines on Immunity,* the Government, during the course of its own investigation and prosecution, persistently sought to obtain testimony taken pursuant to Section 167 of the Bankruptcy Act.

Boucher's testimony was taken in bankruptcy proceedings on or about August 14, 1971 in Dallas, Texas and again on August 6 and 7, 1973 in Denver, Colorado. Subsequent to these events, counsel to the trustee in bankruptcy was contacted by the SEC (Von Stein), which thereafter focused its investigation on the Arctic lease transactions. (Post-Tr. 8/20/76 Tr. 9-12)

[App.]

The SEC (Von Stein) thereafter also secured from the trustee's counsel, the October 1973 trustee's report which admittedly took into consideration Boucher's testimony and, in the summer of 1975, a copy of Boucher's testimony.

(Stip Trial Tr. 4, Post-Tr. 8/20/76 Tr. 9-12, 14-15) [App.]

In its pre-trial affidavit in opposition to Boucher's bankruptcy motion, the prosecution affirmed that it did not have a recollection of reviewing Boucher's transcripts. (Wing Affid. 5/76 ¶ 5) [App.] The Government also admitted, however,

* Department of Justice Memo No. 744, April 8, 1971, to "All United States Attorneys" outlines precautionary measures in dealing with Bankruptcy Immunity under the Organized Crime Control Act of 1970. (Armstrong Affid. 5/11/76) [App.]

that it was of concern to the prosecution as to what position the appellants would take at trial as to the Arctic transactions, and there were a number of discussions on this subject between the prosecution staff and the SEC (Von Stein). (Wing Affid. 5/76 ¶ 7; Vizcarrondo Affid. ¶ 12)[App.]

Von Stein admitted that he had read these transcripts, but could only recall they contained irrelevant matters. (Von Stein Affid. 5/76 ¶¶ 8-9)[App.] However, at the post-trial hearing after a rereading, he admitted he had been in error. (Post Tr. 8/20/76 Tr. 13-14)[App.] The transcript had been discovered in the Government's "Irrelevant" file and for that reason had not been furnished earlier pursuant to pre-trial discovery motions. (Wing Affid. 5/19/76 ¶ 6)[App.]

At the post-trial hearings, the Government, for the first time, informed counsel and the Court that they had directed the SEC (Von Stein) to inspect the Dallas, Texas minutes for the purpose of, among other things, obtaining a "feel" for the appellant Boucher as a witness at trial. (Post Tr. 8/20/76 Tr. 88-90)[App.]

Section 7(a)(10)* of the Bankruptcy Act (11 U.S.C. §25(a)(1)) as part of the Organized Crime Control Act of 1970, affords the bankrupt use and derivative use immunity (§207 of Pub. Law No. 91-452 Cong., 2d Sess. (1970))

Section 21(a) of the Bankruptcy Act provides for an examination of a bankrupt, his or her spouse, and other persons

* The application of immunity coverage to a witness pursuant to 7(a)(10) should not depend on the fortuitous assertion of the Fifth Amendment privilege of the witness. United States v. Monia, 317 U.S. 424, 430 (1933).

when designated by Order of the Court. Immunity applies to the debtor in an examination conducted pursuant to §21(a), since that provision is read in connection with §7(a)(10). United States v. Weissman, 219 F.2d 837,841 [L. Hand dissent] (C.A.2d 1955); In re Bush Terminal Co., 102 F.2d 471-472 (C.A.2d 1965), 349 F.2d 264; 6 Collier on Bankruptcy (14th ed. 1972) ¶6.19, pp. 1224-25.

The above-cited statutory provisions must be in para materia with a Chapter X Reorganization under the Bankruptcy Act. Section 102 of Chapter 10 (11 U.S.C. §502) makes ". . . the provision of Chapters 1 through 7 inclusive [Straight Bankruptcy] . . . apply in proceedings under this chapter [Corporate Reorganization]"

Section 167 of the Act (11 U.S.C. ch. 10 §567) provides for an examination of the "debtor" and thus the near equivalent of a Section 21(a) examination in a "bankruptcy proceeding". In fact, Section 167 is broader in scope and purpose than the other provisions in that the need for complete financial disclosure is more extensive in the context of a Reorganization proceeding involving a public company.* Although there are no

* Section 167(1), in pertinent part, empowers the trustee-in-bankruptcy in connection with a Chapter X Reorganization proceeding to fully examine as to the acts, conduct, property, liabilities, and financial condition of the debtor. In addition to the object of discovering fraud, the purpose of such examination is to determine whether current management should continue and to facilitate the plan of reorganization to be submitted to the SEC and the Court for the benefit of public stockholders and creditors. §167(1), Bankruptcy Act, Title 11 U.S.C.A. ch. 10 § 567(1) (5); 6 Collier on Bankruptcy (14th ed. 1972) ¶7.18, pp. 1210-14. See also, In re South State Street Building Corp., 105 F.2d 680, 682-683 (7th Cir. 1939); Matter of Realty Associates Securities Corp., 54 F. Supp. 787, 788 (E.D.N.Y. 1944); In re Julius Roehris Co., 115 F.2d 723; Gochenour v. Cleveland Terminal Building Co., 118 F.2d 89, 93-94 (6th Cir. 1941).

definitive cases granting immunity under Section 167, the rationale and benefits of immunity should apply to a Section 167 examination. General Stores v. Shlensky, 350 U.S. 462, 467 (1956); In re Standard G.s & Electric Co., 54 F. Supp. 752, 754 (D.C. Del. 1944), 2 Collier on Bankruptcy, supra ¶21.05, pp. 278-282 [p. 278 n. 1, 3]; 6 Collier on Bankruptcy, supra ¶7.19, pp. 1215-1221.

At the time of his Dallas testimony, Boucher was a co-trustee for KRC and at the time of his Denver testimony, he was clearly part of the active management of KRC. Boucher at the time of all his examinations was a principal corporate officer of the bankrupt corporation performing the duties of the bankrupt and was therefore immunized. United States v. Weissman, supra, 219 F.2d 841; United States v. Castellana, 349 F.2d 264, 273-74 (2d Cir. 1965).

Boucher's testimony in the KRC bankruptcy proceedings covered the same subject matter as the instant indictment and the proof offered by the Government at trial. As a result, once the bankruptcy transcripts were somehow bound in the Government's possession, a heavy, almost impossible, burden was on the Government to establish Boucher's bankruptcy testimony was not used directly or indirectly in the investigation and/or prosecution of the case. Kastigar v. United States, 406 U.S. 441, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972).

The evidentiary record made by the Government indisputably shows the Government did not meet its burden in demonstrating the Government did not use, directly or indirectly,

Boucher's bankruptcy testimony in the investigation and/or prosecution of the case against Boucher.

On the contrary, the Government conceded use of Boucher's immunized testimony when it was acknowledged (a) Von Stein was dispatched to inspect the 1971 Dallas transcript to determine, among other things, what kind of witness he would make (Post Tr. 8/26/76 Tr. 88-90) and (b) they had possession of the 1973 Denver transcript which answered the chief prosecutor's question as to what position the appellant would take at the time of trial. (Wing Affid. 5/76 ¶¶ 5, 7; Vizcarrondo Affid. 5/76 ¶12) [App.]

POINT III

THE COURT ERRONEOUSLY PERMITTED THE GOVERNMENT TO INTRODUCE INFLAMMATORY EVIDENCE ON COLLATERAL MATTERS AND THEN COMPOUNDED ITS ERROR THROUGH VARIOUS RULINGS WHICH UNFAIRLY PRECLUDED APPELLANTS FROM CHALLENGING EFFECTIVELY THE MISCONCEPTIONS CREATED BY THE GOVERNMENT

This Point III has been divided into five sections, all of which are interrelated. Section A details the Government's distorted presentation on the irrelevant questions of mark-ups and gross profit margins, together with its efforts to deprecate the value of the Arctic. Section B discusses the erroneous exclusion of proof of developments in the Canadian Arctic since 1969, which was offered to rebut the Government's misleading presentations on damages and value. Section C focuses upon the admission into evidence of an off-the-cuff hearsay remark by an unavailable witness on a fragmented tape, which was presented to the jury as expert testimony on the Arctic's value. Section D asserts that under the circumstances of this case appellants were entitled to a requested charge that the jury must have understood the case in order to convict. And finally, Section E deals with the doctrine of cumulative error.

A. Mark-ups, Gross Profit Margins, Arctic Values and Other Collateral Matters

As the Court properly defined it, this case should have been about whether appellants had made any secret side deals with Mecom and COG (Tr. 586) [App.]. If the trial had been so limited, the jury would have been able to focus on the only charges that could have lawfully resulted in a conviction. Instead, under

the guise of establishing motive,* the Government was permitted to introduce inaccurate and distorted evidence on irrelevant matters which were calculated to inflame the jurors.

1. The Court should have restricted the scope of the Government's evidence as to "motive". The Government's strategy was simple: first, insinuate (without being required to prove) that appellants unfairly "ripped off" FOF in order to reap huge personal profits, and invite the jury to infer that appellants deserved condemnation regardless of their guilt or innocence on the pertinent issues; second, attack the worth and the potential of the Arctic so that it appears improbable that Mecom or COG would have purchased an interest without secret inducements. The strategy worked, and the resulting confusion and prejudice effectively deprived appellants of their constitutional presumption of innocence.**

All this was avoidable. Prior to trial, defense counsel had warned the Court of the open-ended nature of the Government's case and the practical impossibility of trying to combat the

* The central issue was whether appellants actually gave certain secret commitments to Mecom and COG, not whether they had a motive to do so. The basic facts bearing on the issue of motive were conceded: FOF was KRC's largest single customer (Tr. 445, 3832) [App.]; FOF's business was extremely profitable for KRC; appellants arranged the Arctic sales on FOF's behalf in order to satisfy its good customer; and appellants knew that the revaluation would be based on such sales (Tr. 3483-84, 3625, 3802, 3805, 3809) [App.]. Under such circumstances, any proof relating solely to motive should have been kept to a minimum.

** The post-trial statements of an alternate juror confirm that this evidence prejudiced the jurors against appellants from the outset (Armstrong letter, 9/3/76) [App.].

impressions which the prosecutors were intent upon creating. Requests were made to excise paragraphs 18* and 19** from the indictment and to limit the Government's proof. (Def. Trial Mem) [App.]. See Fed. R. Evid. 403. Counsel's concerns were dismissed at the outset of the trial without any statement of reasons (Tr. 2-3) [App.]. As the case unfolded, however, Judge Frankel became increasingly aware that too much of the Government's case was, in his own words, "window dressing" (Tr. 593) [App.]. The danger was clear to the court as early as the fifth day of this six week trial when, after reluctantly concluding that the defense was entitled to read to the jury portions of an exhibit which had been introduced into evidence by the prosecution, Judge Frankel complained:

"I guess it is relevant. I just wonder whether we ought not to strike paragraph 19 out of this indictment and get this case within manageable limits, because if this sprawls over the whole world and all of this is before the jury, I have a question whether anybody will know what a conviction meant, if there is one." (Tr. 590-91) [App.] (Emphasis added).

Throughout the trial Judge Frankel waffled on whether to continue to permit the Government to submit proof on mark-ups and alleged misrepresentations as to the value of properties

* This paragraph charged that as part of the fraud, KRC sold various natural resource properties to FOF at substantial mark-ups. The indictment was changed shortly before copies were given to the jury so as to allege that the mark-ups were the "motive" for the fraud, rather than "part" thereof. (Tr. 3118-19) [App.].

** This paragraph alleged in conclusory fashion that as part of the fraud appellants misrepresented the values of various properties sold by KRC to FOF.

other than the Arctic. Ultimately, upon the continued urging of the prosecutors that such proof was essential to their case, the Court sided with the Government.

The mark-up evidence was never designed to be limited to the issue of motive. Nor was it presented to the jury in a manner calculated to comport with the court's instructions as to its limited relevancy. The prosecutors never departed from the SEC's position that the allegedly excessive mark-ups were the real fraud perpetrated by appellants. As the prosecutors viewed it, the Arctic sales for which appellants have been convicted "was only a small part of a far larger over-all fraud perpetrated by King and Boucher in connection with their sales of natural resource interests to FOF" (Government's Sentencing Mem., p. 2) [App.]. They admitted, however, that a massive undertaking would have been required to prove that KRC's mark-ups had been fraudulent, and the length of the trial would have been substantially extended (Id.).*

The prosecutors highlighted their intended use of the mark-ups as an "aspect of the fraud" in characteristic fashion in their Trial Memorandum (Govt. Trial Mem. p. 10) [App.]. They were not interested in merely showing, as appellants conceded, that the FOF business was extremely profitable to KRC and that appellants had arranged the Arctic sales as an accommodation for FOF knowing that they would be used as bases for a revaluation of FOF's remaining interest. What the prosecutors desired, and

* Defense counsel never had a realistic opportunity to attack this evidence because, as the prosecutors conceded, the task was massive and the underlying data was unavailable to the defense.

what they made full use of, was an opportunity to suggest that the mark-ups were "staggering" (Id. p. 4) [App.]. With enough euphemisms for fraud, whether through overt characterizations or the presentation of complex financial data, at least some of the jurors were bound to get the message. Indeed, Judge Frankel implicitly recognized this fact when he indicated at a pretrial conference with counsel that he would admit evidence of mark-ups only if they appeared to be excessive. With this standard the Court ensured that the Government would attempt to imply that the mark-ups were excessive. This was the very prejudice which should have been avoided.

2. The Government's mark-up proof was distorted and inflammatory. The mark-up evidence was presented in a grossly distorted manner, primarily through a young SEC accountant who admittedly had no prior experience in analyzing the financial statements of oil and gas companies. Government Exhibit 38L, admitted over appellants' objections (Tr. 2621-38, 2642-43) [App.], purported to summarize the mark-ups and the profitability to KRC of 29 lease sales made to FOF by KRC during the three years ended December 31, 1970. The practical impact which the Government sought to achieve through this evidence had been revealed in the prosecutor's opening statement, in which he had promised to prove that appellants had "milked" FOF (Tr. 27) [App.]. The "milking" could only have been a reference to the anticipated proof on mark-ups and gross profits set forth on Government Exhibit 38L, since the Arctic revaluation itself did not result in any material direct benefit to appellants or KRC.

Government Exhibit 38L set forth the prices charged FOF for the property interests it purchased from KRC, and compared those amounts in several respects with figures that were denoted as the "cost [of such properties] to KRC". While appellants have never disputed the sales prices, they have strongly objected to the Government's attempt to characterize KRC's direct acquisition costs (i.e., the out-of-pocket funds expended by KRC upon its initial acquisition of the property) as KRC's entire cost with respect to a particular property.

The misleading nature of the Government's presentation is most graphically demonstrated by the treatment of the Arctic itself. Government Exhibit 38L discloses that FOF paid an aggregate purchase price of approximately \$11 million for its Arctic interests, as compared to KRC's "cost" of \$397,000. The "gross profit" is then expressed in terms of its percentage of the total sales price (96.36%) and FOF's cost is computed as having been 27.47 times KRC's "cost". The message that the Government was sending to the jury by this kind of presentation was clear -- here was the promised confirmation that FOF had been "milked" by appellants.

The Government's presentation was irrelevant to the issues properly before the jury. It was also was grossly unfair and misleading for it hid the real costs to KRC associated with the Arctic. Under accepted accounting techniques one might have reasonably computed the two-year cost total at \$5,416,000, as compared to the \$397,000 shown on Government Exhibit 38L. Instead of the percentage of gross profit to sales price being

96.36%, the fully allocated percentage of KRC's profit to sales price could have been shown as 50.32%; and rather than FOF's cost being 27.47 times KRC's cost, FOF's cost might well have been calculated at 2.01 times KRC's cost. The reasons for these discrepancies is that the Government's presentation ignored the following real costs:

(1) The \$397,000 "cost" appearing on Government Exhibit 38L represented only 50% of the moneys actually expended by KRC during 1968 and 1969 to acquire the Arctic interests. In addition to its initial acquisition costs, KRC was obligated to expend substantial additional amounts in order to retain these interests.

(2) Government Exhibit 38L ignored the substantial costs attributable to the man-years of effort that went into analyzing what areas around the world should be acquired for exploration and whether the Arctic in particular represented an attractive area for investment. All such costs were available to the Government, since they were reflected in KRC's inventory account (Tr. 2991-92) [App. .]* Boucher testified without contradiction that KRC officials had watched the Arctic for many years, had accumulated geological data and had hired staff to prepare for contemplated activity in the area (Tr. 2902-04) [App.].

[]. By the time of the December 1969 sales, KRC had already spent approximately \$2.9 million in the Arctic (Tr. 2923) [App.].

[]. None of these necessary costs were reflected in the Government's figures.

* The Government achieved this misleading result by ignoring the inventory accounts and looking only to the "turnkey ledgers," which did not purport to be KRC's definitive cost records or to contain any allocation of indirect costs.

(3) The Government's computation of KRC's "costs" on the Arctic also excluded, without basis, the following additional costs to KRC: (i) expenses for geologists, geophysicists, engineers and other technical people; (ii) general office expenses for materials and supplies; (iii) costs of administrative personnel; and (iv) sales and promotional expenses, including commissions. In other words, no part of the indirect costs associated with the Arctic, or of the general costs of running a large public company like KRC, were recognized in the Government's misleading "cost" analysis.

While KRC did not attempt to allocate its indirect costs to particular projects, many corporations have been required to allocate such costs in order to comply with various SEC reporting requirements. Often such allocations are made in proportion to sales (Tr. 2278-79) [App.].* If such an approach were followed, KRC's Arctic "costs" would take on a vastly different complexion than as reflected in Government Exhibit 38L.**

* Logically, more of these indirect costs should be attributable to FOF business, because KRC provided considerably more services for FOF than for other customers. Once FOF made a purchase, KRC ran the operation, providing accounting and evaluation services, maintaining lease records, making of lease payments, etc. (Tr. 3003) [App.]. Furthermore, a significant portion of the indirect costs allocable to FOF matters is properly allocable to the Arctic, if only because KRC's large Calgary office was primarily engaged in servicing the Arctic program, which was the most exciting prospect in the organization.

** In 1968, for example, KRC's Arctic sale to FOF constituted approximately 4.1% of KRC's total sales of resource interests and related services (the category on KRC's consolidated statement of income in which the Arctic sale to FOF was reflected). In order to arrive at the true KRC "cost" that the "profit" on this Arctic sale had to bear, one should add to the Government's "cost" figure (i.e., \$24,000): (1) 4.1% of the non-

Granted, there are many different ways to analyze figures, but the analysis suggested herein is less artificial than the one followed by the Government and more likely to approximate the true costs to KRC, as a corporate entity, of its Arctic program. To have permitted the prosecutors to place their simplistic and misleading calculations before the jury was highly inflammatory and calculated to persuade the jury that appellants had taken unfair advantage of FOF for years prior to the Arctic revaluation.*

The Government's approach unavoidably asked the jury to infer that KRC had substantially overcharged FOF for its Arctic interest. Nothing could be further removed from the reality of the oil business. By 1968, KRC had been able to accumulate the

[Footnote cont'd from preceding page]

allocated costs attributed by KRC and its independent accountants to the general category of sales of resource interests and related services (approximately \$282,000); (2) 4% of the indirect costs, including taxes, of KRC as a corporate entity (approximately \$270,000); and (3) 4% of the cost of acquiring data and properties for future development or disposition (approximately \$407,000). Under this analysis, KRC's costs allocable to the Arctic in 1968 would be approximately \$983,000, as compared with the \$24,000 claimed by the Government. Employing the same kind of analysis for 1969, during which period Arctic sales to FOF constituted approximately 8% of KRC's total sales of resource properties and related services, the comparable cost figure would be approximately \$4,433,000. Similar results follow when the same kind of analysis is applied to KRC's sales of other natural resource properties to FOF.

* Although the Government's charts depicting gross profit margins portrayed 1970 as another banner year for KRC (G. Ex. 38M) [App.], KRC lost more than \$53 million in 1970 (G. Ex. 2H) [App.], more money than it ever made on FOF business. This discrepancy between the Government's presentation and financial reality should have been sufficient cause in and of itself for Judge Frankel to strike the mark-up and gross profit margin testimony.

second largest block of acreage in the Canadian Arctic Islands, which represented the only major unexplored area in North America with large geological structures capable of holding immense quantities of oil and gas (Tr. 2907) [App.]. Several large discoveries would have been sufficient to transform KRC and FOF into major oil producing companies. For a 50% interest in 22,000,000 undivided net acres, FOF, which had no geological expertise of its own, paid to KRC approximately \$1.00 per net acre. The indictment itself cites that by July 1969, only several months after FOF's purchase of the major portion of its Arctic interests, J. C. Sproule & Co. ("Sproule"), a knowledgeable independent Canadian geological firm, opined that FOF's entire interest was already then worth an average of \$1.88 per acre -- almost double its purchase price. By the end of 1969, Sproule was estimating the value of FOF's entire interest to be in the neighborhood of an average of \$3.00 per acre; and by June 30, 1970, it believed that the value was something in excess of \$4.00 per acre (Tr. 218-19) [App.]. At the Second International Symposium on Arctic Geology, held in San Francisco, California in early February 1971, three principals of Sproule presented a paper which contained an economic analysis of Arctic exploration. Postulating recoverable oil reserves which could eventually be sold at \$3.50 per barrel -- far less than what has proved to be the market price for oil -- they indicated that reasonable values for large Arctic positions might range from \$16.50 to \$33.50 per acre (King Sentencing Mem. pp. 10-11) [App.].* The record is undisputed that by 1969

* Under this analysis, the present worth of FOF's interest would range from approximately \$160,000,000 to \$320,000,000, as compared with FOF's initial cost of \$11,000,000.

King was publicly on record as having accurately forecast a future oil shortage and resultant higher prices (Tr. 2391-92) [App. 1].

3. The Government's misleading comparison of the gross profit margins on FOF and non-FOF sales was also calculated to inflame the jury improperly. Government Exhibit 38M disclosed, inter alia, that KRC's sales to FOF in 1969 of resource interests and related services had represented 39.26% of all sales of such interests and services, but the FOF sales had supposedly contributed a disproportionate 64.47% of KRC's "gross profit" (defined as sales minus costs and expenses attributed to such sales)* on all such sales. Again, the purpose and effect of this essentially irrelevant evidence was clear: the jury was encouraged to conclude that KRC was charging FOF more than it was charging its other customers.

The prosecutors candidly acknowledged to the Court that defense counsel were correct in their prediction of the adverse impact that this comparison of gross profit margins on different kinds of sales was likely to have upon the jury. While stating that the Government only sought to prove that FOF was a very important customer to KRC (a fact not in dispute), the prosecutors admitted ". . . that the evidence in effect will

* This classification included the direct costs which appeared in the turnkey ledgers and certain indirect costs which KRC allocated to this category of sales. Other indirect costs were excluded, as were the costs of acquiring properties for future development (\$27,500,000 at December 31, 1969).

show . . . [fraud] to some degree" (Tr. 644) [App. . . .]. Nevertheless, the Court refused to limit the Government's proof in this area, and then compounded its error by restricting defense counsel's attempts to rebut the implications such evidence would have for jurors who are unfamiliar with the oil business, its complex accounting aspects, and its differing gross profit margins on different kinds of sales.

No evidence in the record other than the bare profit margin comparison of differing sales in any way supported the Government's view that the relative profitability of the FOF business was the product of fraud. Roger Davis, KRC's Vice President-Finance, who was a Government witness, testified without contradiction that on the 15 to 20 occasions where a common interest, or an interest in the same property, had been sold both to FOF and to another KRC customer, the sales had been made on the identical basis, including the same unit price per acre (Tr. 638) [App. . . .]. Davis was unaware of any instance in which the same property had been sold at the same time to FOF and another customer on a dissimilar basis (Tr. 655) [App. . . .]. Thus, the Government's comparisons involved either different properties, or sales made at different times.

As the independent auditors for both KRC and FOF, Arthur Andersen was fully aware of KRC's direct and indirect costs and the prices at which such properties were sold to FOF. At the conclusion of both 1968 and 1969 KRC year-end audits, Arthur Andersen issued unqualified opinions devoid of any suggestion that KRC's charges to FOF might have been fraudulent. Indeed,

the accountants' work papers included an analysis of KRC's mark-ups which indicated that they were reasonable for the oil industry (D. Ex. AC for ID) [App.]. The author of this analysis was scheduled to be a Government witness, but was excused at the last minute and returned to Denver. When defense counsel attempted to question the partner in charge of the KRC account, Judge Frankel cut off the cross-examination sua sponte on the ground that it was beyond the scope of direct examination (Tr. 2281-82) [App.].*

The Court also prevented appellants from informing the jury that KRC has continued to enjoy the same kinds of mark-ups as before even while operating under the supervision of a re-organization court and a court appointed trustee. Defense counsel argued unsuccessfully that the proffered evidence was required in order to dispel the impression that there was any hint of fraud, unreasonableness or discriminatory treatment in the prices charged FOF by KRC. (Tr. 638-49) [App.].

The prosecutor's arguments had the effect of fostering this misleading impression. "This company, King Resources," he argued in summation, "made money from Fund of Funds like nobody ever made before. The biggest gold mine that they ever struck wasn't in the Arctic, wasn't any place else, but it was in Geneva, Switzerland, it was the Fund of Funds bank account. That was the best structure they ever saw. Even Trueblood hadn't seen

* In ruling on appellants' pre-trial motions directed at improper venue and forum shopping by the Government, the Court had generally indicated that he anticipated much inconvenience and expense could be avoided because many potential defense witnesses would be called by the Government (Memorandum Denying Defendants' Change of Venue Motion, 6/19/75) [App.].

one that good" (Tr. 4323) [App.] (Emphasis added). After summarizing KRC's sales to FOF and the supposed disproportionate profitability of this business, he asked pointedly: "Is there any doubt what was going on? Is there any doubt why this was done? Figures like that don't come out of the air. That was money. This was a customer. This was a customer that had no expertise in natural resources. They would do virtually what they were asked, and they had lots of money to spend, and boy, did they spend it, and spend it and spend it" (Tr. 4324) [App.].

Appellants were convicted here, not of the crimes charged, but of ripping off FOF. The evidence that led to that conviction was presented by the Government in misleading fashion, secure in the realization that there was no practical way the defense -- within the limits of this trial -- could even begin to meet it.

4. The Government further confused and inflamed the jury by its disparagement of the value of the Arctic. Consistent with their position that KRC had overcharged FOF for its Arctic interests, the prosecutors continuously denigrated the value of FOF's Arctic interests. They tried to minimize the importance of the fact that FOF's large position was interspersed throughout virtually the entire Arctic Islands, and they suggested that KRC's interests were considerably less desirable than, for example, Pan Arctic Oil's, because KRC's permits related primarily to offshore locations (Tr. 1148) [App.]. If the prosecutors were to be believed, no one would have wanted to pay even as much

as \$1.88 per acre for the right to drill in hundreds of feet of water under the Arctic ice, let alone \$15 per acre. But the Government's most intensive effort in this regard was directed at the reasonableness of the purchase price which Mecom and COG agreed to pay. The Government insinuated that the \$15 per acre aggregate price set forth in the Arctic contracts (\$7.50 for acreage paid to KRC and \$7.50 to be spent on future work obligations) was so outrageously high that no one would have purchased at that figure unless there was some kind of secret inducement.

The prosecutors attempted to discredit the Arctic sales price by pointing to: (i) the spin-off by FOF of its natural resource assets to a new subsidiary corporation ("Global"), and the ensuing value placed upon Global's stock by the European over-the-counter market; and (ii) a remark made in January 1971 by Neil MacKenzie, the former head of KRC's Calgary office -- as set forth in a truncated tape -- to the effect that the price paid by COG was "ridiculous".*

(a) The Global Spin-off. In the spring and summer of 1970, the FOF directors struggled with the question of what to do with the fund's non-liquid or non-market linked assets. Most of the IOS funds, including FOF, were experiencing severe liquidity

* The remark was made to Frederickson during an all-day conference primarily concerned with other matters. Boucher was present at this meeting, but King was not. A cassette recording was made of at least some parts of the conference, but it did not purport to be a complete record of the meeting. Many portions of the tape were unclear; people entered and left the room without notation; conversation continued while the tape was being changed to another tape and after the tapes had run out (Tr. 3917-18, 3922, 3924-25) [App.].

problems. (Tr. 228-231, 243-44, 247-49) [App. .] There was not only considerable dissatisfaction with IOS management, but also press criticism of the Arctic revaluation (Tr. 238) [App.]. After consulting independent experts, the FOF board decided that it was no longer advisable to retain the natural resource assets within the fund. These assets had become a much greater percentage of FOF's portfolio as stock market prices declined and FOF experienced a prolonged period of substantial net cash redemptions. A plan was announced by FOF whereby, on a stated date, \$20,000,000 cash, all FOF's natural resource assets and certain other non-liquid assets would be transferred to Global, a newly formed subsidiary, whose shares would then be distributed to FOF's stockholders. Global would then attempt to recruit knowledgeable petroleum people to manage the assets as quickly as possible. The FOF stockholders could, if they so desired, maintain their interests in these assets, but after the spin-off they would no longer be able to redeem their shares in Global as they could in an open-end mutual fund like FOF. Accounting conventions dictated that upon the transfer of the assets to Global, the assets would be recorded on Global's books at FOF's original low cost rather than their actual market value (Tr. 2295) [App.].

The spin-off occurred at the close of business on August 7, 1970 (Tr. 248) [App.]. Prior to that time, any FOF stockholder could have redeemed his shares at the then net asset value of approximately \$18.47 per share (Id.). After the spin-off, FOF's remaining net asset value on its books was \$7.44

per share. Global's stock was quoted in the European over-the-counter market in the fall of 1970 at only \$2 to \$3 per share, which reflected, of course, the low value of the assets on Global's books as well as concern over the spin-off itself. (Tr. 250) [App.]. This data, which was introduced over strenuous defense objections (Tr. 249-250) [App.], was used by the prosecutors as if it showed the Arctic's true value in 1970. The Government argued that the difference between the \$11.03 per share of value supposedly attributable to the transferred assets* and the bid price for Global's stock was somehow an accurate reflection of the damage appellants had inflicted upon FOF's stockholders.

This distorted line of argument was too much even for Conwill, the former FOF director and the witness through whom this evidence was introduced. On cross examination Conwill protested that the prices juxtaposed by the Government were not at all comparable (Tr. 332-34) [App.]. However, an attempt to have the witness explain this rather complex question was cut off by the Court and the jury never received any illumination on the subject. (Tr. 334) [App.].

(b) The MacKenzie remark. The Court's willingness to permit the prosecutor to use MacKenzie's 1971 hearsay statement as affirmative evidence against the appellants on the value question was also insupportable. Appellants have detailed elsewhere

* There was no showing that the entire decrease in FOF's net asset value was attributable to the Arctic properties, but the Government nevertheless assumed this to have been the case.

herein (infra) why the admission of this testimony was reversible error in and of itself. Suffice it to say at this point that the prosecutor deliberately saved this evidence for his rebuttal case and, because of MacKenzie's unavailability (he had moved to South Africa), the Government was able to make effective use of MacKenzie's comment not once, but twice during summation (Tr. 4330; 4457) [App.] . On the latter occasion the prosecutor remarked: "The man who probably knew that area [the Canadian Arctic] the best of all in the entire company, Mr. Neil MacKenzie, tells Boucher that the price was ridiculous and Boucher doesn't deny it. That is the issue in this case" (Tr. 4457) [App.] (Emphasis added).

As stated earlier, the Court should not have permitted this to be the issue. From the outset, however, the Government was allowed to present this case on that basis. Appellants attempted to counter this presentation by challenging the notion that the Arctic contract price had been unreasonable and that the FOF stockholders had been seriously damaged. They offered to prove through expert testimony that the Arctic interests continue to be extremely valuable, and that the FOF stockholders who have retained their interests in the Arctic through stock ownership in Global can expect to reap handsome benefits. Judge Frankel rejected this offered testimony. The issues of value and damages which the prosecutors had injected into this case were thereby turned into one-way streets on which appellants could not travel.

B. Appellants were Improperly Precluded from Rebutting the Government's Proof as to Damages with Evidence of Post-1970 Developments which Confirmed the True Value of FOF's Arctic Interests.

As we have seen, the prosecution repeatedly denigrated the value of the Arctic to the jury and sought -- successfully -- to create the impression of massive fraud in the sale of ice-covered waters that contained no commercially extractable oil and gas. Early in the trial, Judge Frankel instructed defense counsel that they were not to comment upon post-1970 Arctic developments and all evidence on that topic was excluded (Tr. 12, 51) [App.].

The presence of hydrocarbons in the Canadian Arctic had long been known (Tr. 1944-45) [App.], and the particular Arctic properties covered by FOF's interests contained at least six enormous geological structures with the potential for holding large amounts of oil and gas (Tr. 1749-50, 2920-21) [App.]. Both before and after 1969, discoveries of additional reserves continued to be made, and with each discovery the day when production in the Arctic would become economically feasible came closer to a reality. Shortly before trial, yet another major confirmation of oil and gas reserves on the FOF lands was made on a 2,000 acre tract. (Tr. 1796-97) [App.].

Under the direction of Trueblood, COG's president, COG's technical engineers prepared a geological and economic analysis

of the additional reserves. The defense attempted to place this evidence on the record in camera through Trueblood (an expert on this subject), so that the appellate court would have before it the testimony that was being withheld from the jury (Tr. 1796) [App.] . The Court declined to permit this. Instead, counsel was instructed to make an offer of proof on these expert matters. Counsel attempted to comply as best they could, citing the following: COG's study estimated that the recently confirmed gas reserves on the 2,000 acre block were worth \$400,000,000 on a discounted basis (approximately \$200,000 per acre) (Tr. 1796-97) [App.] ; other recent discoveries in the Arctic meant that almost enough gas has now been located (perhaps as much as 19 trillion cubic feet) to make a pipeline economically feasible (Tr. 1799) [App.] ; and serious negotiations were then under way among KRC (which retains a sizeable Arctic interest), COG, Global, Sun Oil and Pan Arctic Oils concerning the possible sale of some or all of the Arctic interests at prices ranging as high as several hundreds of millions of dollars (Tr. 1797-98) [App.] . The Court cut off further discussion and adhered to its previous ruling (Tr. 1800) [App.] .

1. The excluded evidence was relevant to show lack of damage to FOF and lack of specific intent. The key to the prosecutor's claims that appellants had severely damaged FOF's stockholders was the Government's erroneous contention that the Arctic was worth far less than the value placed upon it by the December 1969 Arctic sales, or even the much lower price at which it had been earlier sold to FOF by KRC. Though not required to do so, the Government is permitted in a fraud prosecution to introduce evidence of damages on the rationale that such evidence is probative on the issue of intent,* an element of the offense the Government is required to prove. Linden v. United States, 254 F.2d 560, 566 (4th Cir. 1958). See United States v. Regent Office Supply Co., 421 F.2d 1174, 1181 (2d Cir. 1970); Farrell v. United States, 321 F.2d 409, 419 (9th Cir. 1963), cert. denied, 375 U.S. 992 (1964).

Appellants were entitled to meet the Government's allegations as to damage and specific intent. Without the opportunity to apprise the jury of post-1970 developments confirming the Arctic's true value, however, the Government's claim of damages and wrongful intent remained plausible. Just as damage may indicate intent, lack of damage is probative as to an absence of intent.

* Although not expressed by the courts, it also seems clear that the Government's showing of damage necessarily affects the jury's judgment of the gravity of the offense and, therefore, bears on the likelihood of conviction. In reality, unspoken matters such as these go to the heart of the jury's decision and the law has shaped itself to reflect this reality. Where the Government alleges the damage, elementary fairness entitles the defense to rebut it.

On this basis alone, evidence of subsequent developments bearing on value should have been admitted.

In Worthington v. United States, 64 F.2d 936 (7th Cir. 1933), a mail fraud prosecution for sale of valueless land, defendant was permitted to introduce evidence from satisfied customers which tended to refute the Government's claim of a fraudulent scheme. Similarly, in Little v. United States, 73 F.2d 861 (10th Cir. 1934), defendant, while freely admitting he had made certain representations as to the value of a certain mine, denied that they were made with fraudulent intent. In reversing his conviction, the court stated:

"The trial court declined to hear evidence as to the mines acquired and operated by the Paradise Company in Colorado, long after the indictment letters were mailed. . . . Events occurring after the letters were mailed might shed light upon the intent of defendant when the letters were mailed. . . . Where a specific intent is an essential element of a crime, evidence which sheds any light upon a question so difficult of exact proof as a state of mind, is admissible." (73 F.2d at 867).

This Circuit has long held that lack of damages is relevant to the issue of intent in an analogous situation. In United States v. Matot, 146 F.2d 197 (2d Cir. 1944), a conviction was reversed where evidence tending to show lack of damage and subsequent repayment, or offers of repayment, was excluded. Judge Learned Hand spoke for the Court:

"It is of course possible that the offer indicated only a change of heart, an effort to avoid the consequences of what he had done; but it was also possible

to take another view and read it as confirmation of his denial that he had ever contemplated a fraud, and that he was ready to go to lengths to protect the bank. . . .

"Although Matot's testimony was the only direct evidence upon his intent, it was not fair to confine him to a bare denial -- never impressive in the mouth of the accused. He was entitled to corroborate that denial by any conduct which confirmed it." (146 F.2d at 198).

The same result should govern here, where the excluded testimony would have tended to negate damage to FOF and intent by appellants to concoct non-arm's length sales. Indeed, this case presents even stronger facts favoring admissibility than Matot, where the subsequent developments were brought about by the defendant himself. Here the evidence was objective; the confirmation of the reasonableness of a belief in the value of the Arctic was to be supplied by expert testimony concerning geological data and economic analysis, all of which tended to show the values inherent in these properties. This evidence was vital to dispel the Government's assertions to the contrary. If the beliefs of appellants -- and, for that matter, Mecom and COG as well -- in

the value of the Arctic could have been shown to have been bona fide and reasonably based, appellants' versions of the mechanics of the Arctic sale, and particularly their lack of any specific intent to defraud, would have become more credible to the jury.

2. The present value evidence was also admissible in response to the Government's attacks on the reasonableness of the Arctic sales price. Through the hearsay statement of MacKenzie, an absent witness apparently under Government subpoena (Tr. 3909-10) [App.], the prosecutor was permitted to argue that this case was really about a "ridiculous" sales price (Tr. 4457) [App.]. Current developments confirming the value of the Arctic would have demonstrated, however, that the price had been a conservative estimate of the reasonable potential of the area. The willingness of COG and Mecom to assume the risks inherent in their purchase commitments would have been more understandable. Indeed, the deal would look like a bargain for them, rather than the rip-off pictured by the Government.

The proffered evidence of current developments was directly relevant to the Arctic's value in 1969. See 3 Wigmore, Evidence § 717 n.1 (Chadbourn rev. ed. 1970). The issue is the intrinsic value of the property and subsequent developments bearing on its capabilities are directly relevant on that issue. As the Supreme Court stated long ago, in executing the difficult task of "estimating the market value of land, everything which gives it intrinsic value is a proper element for consideration;

not only its present use but its capabilities are to be considered." Wetmore v. Rymer, 169 U.S. 115, 128 (1898).

In a wide variety of circumstances the courts have not hesitated to consult subsequent developments so as to accurately assess an earlier market price for a particular property. Thus, when it became necessary to determine market value for certain public utilities property condemned by the Government, this Circuit held that it had been reversible error to exclude evidence of subsequent developments, saying:

"It would seem an eerie conclusion that a court must resort to guess, closing its eyes to reality, when its decision must actually be formulated after the true facts have become available. We think the evidence admissible not as a standard of value in itself, but for its bearing upon the prospective values at the time of taking." United States v. Brooklyn Union Gas. Co., 168 F.2d 391, 397 (2d Cir. 1948).

Similarly, when the market value of a patent at an earlier time was in issue, the Supreme Court held it proper to admit evidence of the actual subsequent value of the patent. Sinclair Refining Co. v. Jenkins Pet. Process. Co., 289 U.S. 689, 697-98 (1933) (Cardozo, J.). Evidence of subsequent value has also been admitted by courts faced with the necessity of determining market value in a variety of situations: United States v. 691.81 Acres of Land, 443 F.2d 461 (6th Cir. 1971) (condemnation); Dellefield v. Blockdel Realty Co., 128 F.2d 85, 97 (2d Cir. 1942) (action for fraud); Groff v. Smith, 34 F. Supp. 319, 323-24 (D. Conn. 1940) (tax assessment); Kelsea v. Fletcher, 48 N.H. 482 (1869)

(contract); Whiting v. Price, 172 Mass. 240, 51 N.E. 1084 (1898) (Holmes, J.) (action for fraud); cf. Hubbel v. Meigs, 50 N.Y. 480, 491-92 (1872) (action for fraud).

Since the Government placed the value of the Arctic directly in issue, appellants were severely prejudiced by the denial of any opportunity to combat the Government's contentions with whatever probative evidence was available. The Government was wrong, and the evidence which best demonstrated that fact was kept from the jury.

3. The evidence of post-1970 developments was also admissible to rebut the charge that appellants misrepresented the "future potential" of the Arctic and other properties. In particularizing the allegations of the indictment's paragraph 19, the Government charged that appellants had fraudulently misrepresented that "[t]he value of FOF investments in natural resource projects, in terms of their future potential, are materially understated as of July 1970" (Govt. Bill of Particulars, 7/9/76 at 3) (emphasis added). Indeed, testimony was introduced that King said, in July, 1970 that "[v]alue ascribed to the investments in terms of future potential are materially understated . . ." (Tr. 1310) [App.]. Although the full extent of that potential has yet to be realized, evidence of current developments makes clear that defendants' representations were anything but fraudulent. They were absolutely true.

A sensible way of gauging the reasonableness of an earlier prediction is to examine subsequent developments. See Richland v. Crandall, 262 F. Supp. 538, 548 n.8 (S.D.N.Y. 1967).

Although the district court in Dabney v. Chase Nat'l Bank, 98 F. Supp. 807 (S.D.N.Y. 1951), aff'd in part, rev'd in part, 196 F.2d 668 (2d Cir. 1952), opinion supplemented, 201 F.2d 635 (2d Cir.), cert. dismissed, 346 U.S. 863 (1953), did not rely upon such evidence, it approved of its use in circumstances similar to those in our case:

"The plaintiff further argues that when one has recourse to prophecy to establish value, it may be shown by subsequent events that the prophecy was unreasonable when made. I believe that this is true if the subsequent events could reasonably be anticipated at the time of the appraisal. But then this would not be strict hindsight but rather would be an attack on the bases of the prophecy at the time it was made." (98 F. Supp. at 840).

The converse of this principle seems equally true: subsequent events which could reasonably be anticipated may bear out the reasonableness of a prophecy when made. Whether the post-1970 Arctic developments could have been reasonably anticipated in 1969 -- as in fact they were -- was an issue for the jury, not the court, to decide.

This Circuit has already indicated that subsequent events may be considered in determining the reasonableness of prior predictions of such events. In United States v. Tellier, 255 F.2d 441 (2d Cir. 1958), defendants were convicted of mail and securities fraud for having misrepresented during a securities offering that they were currently operating at a profit. Defendants objected to the district court's exclusion of evidence which showed that the corporation operated at a profit the year after the last security was offered. This Court affirmed that

ruling, but only because the defendants had made a statement of present fact, rather than a prediction as to a later period:

"[T]he gist of the charges against the defendants was not, as Tellier suggests, that they falsely represented that ATC would eventually be prosperous. The tenor of the false representations charged were the statements and omissions concerning the current condition of the corporation. The falsity of these representations and the misleading effect of the omissions could not be altered by proof that ATC was operating at a profit at the time of trial. . . ." (255 F.2d at 449.)

Where, as in our case, the Government has specifically alleged that appellants fraudulently misrepresented the "future potential" of the Arctic, appellants should have been able to counter this assertion with affirmative proof of developments confirming that potential.

C. The Court Erroneously Admitted an Inflammatory Hearsay Statement on a Collateral Matter, and then Exacerbated the Error by Permitting the Government to Use the Statement as Expert Testimony and as Having Prompted an Admission by Silence.

Near the close of the Government's cross examination of Boucher, the Government asked whether Boucher had been present at a January 29, 1971 Board meeting of KRC (Tr. 3269) [App.]. Boucher acknowledged his probable presence, although he did not recall the particular meeting. The prosecutor then pressed for specific recollections of conversations at that meeting, asking over objection whether Boucher recalled statements by Neil MacKenzie to the effect that, in his opinion: (i) COG had entered into its Arctic agreement without proper management assessment (Tr. 3274)

[App.] ; (ii) any inspection of the COG deal would subject COG's board of directors to enormous shareholder scrutiny (Id.); and (iii) the price was "ridiculous" (Tr. 3275) [App.] .

These questions of Boucher were prompted by a transcript of a portion or portions of that KRC meeting (G Ex. 48-0) [App.], which had been prepared from cassette tape recordings. The tapes did not purport to be complete transcripts of the meeting. Moreover, the tapes of this meeting were interspersed with conversations from other meetings which occurred at other times.

The meeting itself was not about the value of the Arctic. COG was threatening KRC with suit. There had been negotiations for settlement, and COG had issued an ultimatum to KRC: either accept COG's settlement offer by 5:00 P.M., Jan. 21, or COG would sue. The KRC directors met for seven or eight hours to determine the proper response to COG.* The tape of this meeting covered only a portion of the meeting. Within the period that was transcribed, MacKenzie, one of the directors, explained his view of the posture KRC should assume with respect to COG's threat. It was in the course of this exposition to those present in the room that MacKenzie made the statements relied upon by the Government (G Ex. 48-0) [App.].

Boucher resumed the stand to specifically acknowledge that the MacKenzie statements were made, eliminating the need for the tapes themselves to be admitted. He testified that at the meeting he was concentrating on the proper direction for KRC

* By this time King was no longer a KRC director and was not present.

to take, and was not about to respond to irrelevant statements of the Arctic's value (Tr. 3969) [App.].*

The prosecutor successfully overcame the defense's objections to the admission of this evidence by arguing that the Government was "only going to prove" that under the circumstances of the meeting, Boucher made no comments about MacKenzie's statements "because there was nothing that he could say and he agreed with it" (Tr. 3919) [App.]. But the Government later determined that more effective use could be made of the statements in evidence: it informed the Court of its intent to argue that MacKenzie's statements were those of an expert (Tr. 4256) [App.]. Rejecting the defense's counsel's argument that MacKenzie's hearsay statements had been admitted only as a purported admission by silence, the Court stated that "nobody ever suggested a view of the kind you are now reasserting. There was no such limitation" (Tr. 4257) [App.]. On the contrary, the Government, now permitted to argue the statements as expert opinion, had specifically so limited their use in its offer of proof.

* At the time of trial, MacKenzie was living in South Africa, but apparently was under Government subpoena. Defense counsel informed the Court that they had recently interviewed MacKenzie by telephone from South Africa and that MacKenzie had informed counsel that he had told the prosecutors that while the \$15 contract price was high, it "was not unreasonable in light of the fact that King Resources was at that time the only company giving farmouts over a large acreage in the Arctic and that that was the only way you can buy in" (Tr. 3905-06) [App.]. Despite considerable doubt as to whether MacKenzie's excerpted tape statement was an accurate or complete reflection of his opinion at that meeting, the Government made no effort to bring MacKenzie in to testify. Nor did the Court require the Government to do so, notwithstanding the information recently obtained from MacKenzie by telephone. "The telephone call, . . ." said the Court, "however expensive and exotic, doesn't cut much ice with me" (Tr. 3914) [App.].

1. The MacKenzie remark was incompetent as expert opinion, but the court erroneously permitted it to be used for that purpose. Several of the essential prerequisites for expert opinion were nonexistent in this case: the testimony did not bear on proper issues in the case; MacKenzie had never been qualified; and appellants had no opportunity to cross examine MacKenzie as to the bases for his remark or the facts supporting it. See Fed. R. Evid. 702, 705.*

These kinds of questions are often said to lie within the trial court's sound discretion. United States v. Bermudez, 526 F.2d 89, 98 (2d Cir. 1975), cert. denied, ___ U.S. ___ (1976); United States v. Green, 523 F.2d 229, 236 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976). But fairness dictates that in exercising that discretion the court should employ the same criteria for the prosecution's experts as it applies to those testifying for the defense. As discussed earlier, defense counsel had attempted to elicit Trueblood's opinion on the value of certain Arctic acreage. Despite his experience in evaluating properties, his background as a petroleum engineer and the fact that he has testified on numerous occasions as an expert witness, Judge Frankel found him unqualified to supply these opinions:

"[C]ertainly not on these huge areas up there. You are going to have to tell me what he saw about them, what he did about them, what studies he has made of them, and then I will allow you to elicit from him the differences, but not before that." (Tr. 1771) [App.]**

* The inability to cross examine was especially significant here in view of MacKenzie's statements to defense counsel.

** No attempt was made to supply these prerequisites because the Court refused to admit the value evidence in any event.

Yet MacKenzie's remark was allowed to come before the jury with none of these or any other questions ever having been asked of him. While expert testimony may be given without prior disclosure of its basis, the "expert may in any event be required to disclose the underlying facts or data on cross-examination." Fed. R. Evid. 705. Moreover, it has been commented that in view of the relatively narrow scope of discovery in criminal cases, the trial court should often require detailed preliminary disclosure of the premises on which the expert relied. J. Weinstein and M. Berger, Weinstein's Evidence ¶ 705[01] at 705-9 (1975). In this case there was no disclosure, preliminary or otherwise -- just a bare off-the-cuff remark contained on a truncated tape recording which may well have taken it out of context, and was never subject to cross examination.

2. The admission of MacKenzie's remark denied appellants their constitutional rights to confront the witness against them.*
As applied by Mr. Justice Rehnquist in Mancusi v. Stubbs, 408 U.S. 204 (1972), the standard for determining the circumstances under which incriminating hearsay statements may be admitted appears to be twofold: (1) the witness must be actually unavailable, the adjudicating authority being required to "make a good faith effort to obtain the presence of the witness" (408 U.S. at 212); and (2) a court must be assured there

"are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," Dutton v Evans, [400 U.S.] at 89, and to 'afford

* U. S. Const. Amend. VI.

the trier of fact a satisfactory basis for evaluating the truth of the prior statement, 'California v Green, [399. U.S.] at 161." (408 U.S. at 213).

The Mancusi Court found that the witness absent there was truly not available; like MacKenzie herein, he was living abroad. Unlike the Tennessee state authorities in Mancusi, however, the federal government can compel a United States citizen's attendance in a federal criminal proceeding. 28 U.S.C.A. § 1783 (1968).* As a necessary precondition to the admission into evidence of MacKenzie's extrajudicial statement, the Government should have been required to bring him before the court.**

As for the second part of the standard, statements which have evidenced satisfactory "indicia of reliability" are characteristically those which, like the statement in Mancusi, have been subject to cross examination at an earlier time. That certainly was not the case with MacKenzie's remark -- comments made in the course of a day long meeting dealing with another issue and recorded only in part. Nor, as will be discussed below, do considerations which permit an exception to the hearsay rule in certain situations support the reliability of the statement.

* The prosecutor offered to use United States process to bring MacKenzie to the trial if appellants bore the costs. (Tr. 3909-10) [App.]. It was never explained why, even if they could, appellants should be required to bear the cost of transporting a Government witness.

** Again, the trial court was less than even-handed. Defense counsel sought to introduce a transcript of prior sworn SEC testimony, taken by the SEC attorney assigned to this case, of an important witness who lived in Denver and who had deliberately made himself unavailable. The Court refused to admit the testimony on the ground that defense counsel should have brought in the witness (Tr. 4029-35; 4130-36) [App.].

Dutton v. Evans, 400 U.S. 74 (1970), has been thought to add a third consideration to a confrontation clause analysis: whether "the evidence is 'peripheral' rather than 'crucial' or 'devastating'. . . ." United States v. Yates, 524 F.2d 1282, 1286 (D.C. Cir. 1975). MacKenzie's remarks were in no way peripheral to this case as it was actually tried. It was used with devastating effect by the Government on summation and inevitably had a crucial impact on the jury.

3. There was no applicable exception to the hearsay rule which supported the admission of MacKenzie's remarks. As stated earlier, the Government's initial purpose in offering MacKenzie's remarks was that they resulted in an admission by silence by Boucher. Even under this purported rationale, the statements should have been excluded. "Silence may imply assent to the correctness of a communication, but on certain conditions only." 4 Wigmore, Evidence § 1071 at 102 (Chadbourn rev. ed. 1972). As the Supreme Court recently observed, "[i]n most circumstances silence is so ambiguous that it is of little probative force." United States v. Hale, 422 U.S. 171, 176 (1975).

Before an accusation and the ensuing silence is competent as an admission in a criminal case, the accusation must have been one against the defendant personally; one which would naturally bring forth a contradiction absent assent. Orser v. United States, 362 F.2d 580, 585 (5th Cir. 1966). In this case, however, the thrust of MacKenzie's statements were not directed at Boucher, but rather against the price of the Arctic sales. Boucher never set that price (Tr. 3018) [App.]. Although he felt the price was reasonable, MacKenzie's statements were

not the kind of personal attack on Boucher which would demand a retort.

This is especially true when MacKenzie's statements are placed in context. The statements were only tangentially relevant to the subject matter of the January 21 meeting. Boucher testified that he "wasn't concentrating on this particular aspect at that time" (Tr. 3969) [App.]. The issue was whether to settle with COG, and as the then chief operating officer of KRC, Boucher was necessarily preoccupied with that question. These circumstances can hardly be said to constitute a situation compelling denial.

Indeed, it has been suggested that before silence is ever permitted to operate as the admission of a criminal defendant, a court should inquire into the personality of the defendant. Developments in the Law -- Confessions, 79 Harv. L. Rev. 938, 1039 (1966). Before it could ever have been suspected that there would be an issue of admission by silence in this case,* we described Boucher as a "hard-nosed, tough, tight-lipped character. . . . You don't ask the question, you don't get the answer." (Tr. 68) [App.]. A system which considered the various personal traits of the accused, "although not perfect, would greatly decrease the likelihood that silence attributable to a personality quirk of the defendant may be interpreted to indicate guilt." Developments, supra. It certainly

* Although defense counsel had copies of the tapes of this and many other meetings, no transcript had been made because of difficulties experienced in attempts to transcribe the tapes (Tr. 3924) [App.].

would not treat the courtesy shown by one as taciturn as Boucher in not interrupting his friend MacKenzie as an admission by silence.

D. The Court Erroneously Denied Defendant's Request to Charge the Jury That They Must Understand the Government's Case to Convict.

There can be little doubt but that the manner in which the prosecutors presented their case injected unnecessary complexity and confusion. This danger had been anticipated by appellants prior to trial and during the course of the trial, Judge Frankel appeared to agree when he remarked: "I have a question whether anybody will know what a conviction meant, if there is one." (Tr. 591) [App.].

Appellants sought protection in the Charge of the Court, asking for a direction that the jury must understand the Government's case before it could convict. The Court was requested to instruct the jury that it could not convict on the basis of speculation or suspicion and, further:

"In this regard, I think you realize by now that you have heard a fairly complex case. I instruct you that if you do not fully understand the nature of the proof or the charges against either defendant, then you must acquit that defendant. This is because, absent such understanding, proof of guilt cannot have been established beyond a reasonable doubt." (Defendant King's Request to Charge, No. 23) [App.].

Judge Frankel rejected the request, commenting that he doesn't "give that kind of thing." (Tr. 4186) [App.]. Appellants respectfully contend that this rejection, in the circumstances of this case, constitutes reversible error.

The Government bears the burden of making its case understood by the jury. "'It is the duty of the government to establish . . . guilt beyond a reasonable doubt.' . . . [I]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." In re Winship, 397 U.S. 358, 362, 364 (1970), quoting in part from Leland v. Oregon, 343 U.S. 790, 802-03 (1952) (Frankfurter, J. dissenting). It is axiomatic that if the jury does not understand the case, this constitutionally imposed burden has not been met.

In United States v. O'Connor, 237 F.2d 466 (2d Cir. 1956), this court reversed a conviction for tax evasion. The defendant had been convicted on the "net worth method" by a jury. The trial spanned 50 days, with 435 complicated exhibits introduced by the Government, and 145 by the defendants. Despite sufficient evidence to convict -- some of it admittedly understood by the jury -- this Court thought the situation serious enough to warrant reversal:

"There is serious doubt that the jury ever understood the issues of the case or the bearing that the complex evidence might have on those issues. . . . Were the error of less importance, we would affirm the conviction, but this charge was so grossly inadequate that we have no alternative. Kotteakos v. United States, 1946, 328 U.S. 750, 763-766, 66 S.Ct. 1239, 90 L.Ed. 1557. Such must be our decision where, as here, the evidence adduced and the issues involved were extremely complex and where no indication is given that the jury received the necessary guidance from counsel or the court at any other point in the

trial. Consequently, the judgment below must be reversed, and the case remanded for a new trial." (237 F.2d at 472-73)

This prosecution was at least as complicated and confusing as O'Connor. The six week trial saw 49 witnesses testify, 369 exhibits received in evidence, and 4,614 pages of transcript recorded. The facts were six to nine years old, memories had faded, documents had been lost, witnesses had died and records were unavailable to the defendants. Refuting the prejudicial evidence on mark-ups and comparative gross profit margins alone required explanations as detailed and technical as any necessary to clarify the "net worth method." Added to this was the clouding quality of the "similar acts" evidence and the Government's attempts to impugn the price of the Arctic sales and the projected value of the property rather than the manner of the valuation sales.

Indeed, the Court's failure to ensure understanding was more egregious in this case than in O'Connor. Here the confusion resulted from proof which was actually collateral to the crimes alleged, but in effect was condemning and overly prejudicial. Moreover, there was no specific request in O'Connor, as there was here, to instruct the jury of the Government's obligation to make the charges comprehensible.

There is every reason to believe that the requested caution was essential for a fair verdict. After six weeks of testimony and the introduction of voluminous documents, the jury returned its verdict after a mere two hours of deliberation without requesting a single exhibit or asking that any transcript

be read. A former alternate juror, excused at the end of the case, suggested why the jury apparently had so little trouble coming to a verdict. This juror told counsel* and later informed the Court that paramount in his fellow jurors' minds was the imminent bicentennial celebration over the Fourth of July weekend. Plans had been made, and bitterness had been expressed at the possibility of being sequestered over the holiday. As the alternate juror wrote to Judge Frankel, in part:

"The jury discussed the facts of the case throughout the trial. They were greatly awed from the beginning because of the amounts of money involved and the wealth of the defendants. From the start of the trial the opinions expressed by the jurors were not objective but were very critical of the defendants. It did not seem to me that the defendants were ever given any benefit of doubt.

"The evidence presented during the case was greatly confusing to people who had no background in the kind of business transactions involved. It is my opinion, based on the jury's conversations, that many of the jurors were confused by the issues and didn't understand the evidence." (Armstrong letter, 9/13/76) [App.].

The requested charge would not have added to the prosecution's burden; it would merely have ensured that the jury was aware of the extent of that burden. In a complex and confusing case, which necessitated a charge lasting 3-1/2 hours, covering 100 pages of transcript, the jurors (one of whom had to be awakened by the Court during its charge (Tr. 4564) [App.]) should have been told explicitly that they must comprehend before they can convict.

* He first spoke to defense counsel immediately after being excused, while the jury was deliberating. Counsel promptly informed the prosecutor of what was said.

The Court chose instead to rely solely on the usual instructions about "burden of proof" and "reasonable doubt." The Supreme Court long ago recognized that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." Miles v. United States, 103 U.S. 304, 312 (1881). Why then rely only on difficult concepts like these, indirectly to express thoughts which can be easily and directly stated. What could have been the reason for not taking a few words to tell the jury simply that if they did not understand the evidence they could not convict? It is no less offensive to due process to send a man to prison over charges that were never made comprehensible to the jury than it is to convict where reasonable doubt exists.

E. The Cumulative Effect of These Errors Denied Appellants Their Constitutional Rights to a Fair Trial

Each of the sub-points detailed above warrants reversal of these convictions. The mark-up and comparative gross profit margin presentations were so confusing and prejudicial that they should have been excluded. Fed. R. Evid. 403. The defense was precluded from combatting the Government's inflammatory presentation as to value and projected value by the exclusion of evidence of current developments confirming the Arctic's intrinsic value. The erroneous admission of "expert testimony" masquerading as an admission by silence of Boucher further prejudiced the defense. Aware of these dangers, defendants requested that the jury be instructed that it was the Government's responsibility to present a case to the jury that was understandable. This request was erroneously denied.

Of course, the inquiry on appeal is not limited to whether "each isolated incident viewed by itself constitutes reversible error." United States v. Grunberger, 431 F.2d 1062, 1069 (2d Cir. 1970). Rather, it is also proper to ask whether the "total effect of the errors . . . found . . . casts such a serious doubt on the fairness of the trial that the conviction must be reversed." United States v. Guglielmini, 384 F.2d 602, 607 (2d Cir. 1967). United States v. Semensohn, 421 F.2d 1206, 1210 (2d Cir. 1970); U.S. Const. amend V. See also Delzell v. Day, 36 Cal. 2d 349, 351, 223 P.2d 625 (1953); 5 Am. Jur. 2d, Appeal & Error § 789 (1962). Addressing that question to this case can elicit only one fair response -- the convictions must be reversed.

POINT IV

APPELLANT BOUCHER FURTHER ADOPTS ALL THOSE ISSUES OF LAW AND FACT URGED BY APPELLANT KING IN HIS APPEAL.

CONCLUSION

Because of the unfairness of the trial, the erroneous construction of the law applied, and the faulty institution of the proceeding, the conviction below should be reversed.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA, : C/A Ref. No. 76-1440
Appellee, : United States
-against- : District Court
JOHN M. KING and : Southern District
A. ROWLAND BOUCHER, : of New York
: Hon. Marvin E. Frankel
: 75 Cr. 70

Defendants-Appellants. : AFFIDAVIT OF SERVICE
-----x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Rufel Posner, being duly sworn, deposes
and says that deponent is not a party to the action, is over
18 years of age and resides at
That on the 10th day of January, 1977, deponent served the
within Briefs for Defendant-Appellant King and Defendant-
Appellant Boucher in this action by personally delivering
copies of same to John R. Wing, U.S. Attorneys Office, 1 St.
Andrews Plaza, New York, New York.

Sworn to before me this
10th day of January, 1977.

Joan Farrell

Notary Public

JOAN FARRELL
Notary Public, State of New York
No. 03-4521530
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires March 30, 1978

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Appellee,

-against-

JOHN M. KING and
A. ROWLAND BOUCHER,

Defendants-Appellants.

AFFIDAVIT OF SERVICE

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